KEMUNTING TIN DREDGING (M) BHD. & ORS.

v.

BAHARUDDIN MA'AROF & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C 4579 OF 1984]
23 MAY 1985

COMPANY LAW: *Election of Directors - Rival factions each elected their own board of directors - Injunctions sought by both factions - Shareholder's intervention - Meaning of "impracticable to call a meeting".*

Members of the plaintiff company held an EGM on 3 December 1984. The plaintiffs claimed that they have lawfully terminated the EGM after electing the board of directors. The defendants, however, continued the EGM thereafter and elected directors from the floor. The two factions then applied for injunctions restraining the other from acting as directors. The outcome of these applications was that the defendants were allowed to discharge their functions as directors but were restrained from holding any board of directors meeting of the company. They also undertook not to transfer the assets of the company. The day to day running of the company was unaffected.

The main issue here is whether the intervener, a registered shareholder of the plaintiff Company, can obtain assistance from the Court to hold a general meeting to resolve the dispute, pursuant to s. 150 of the Companies Act 1965.

Held:

[1] The Court will only intervene under s. 150 if it is not practicable for the applicant to call a meeting under its Articles of Association and under the relevant provisions of the Companies Act.

[2] Since the applicant can call for a general meeting under ss. 143(3) and 145(1) of the Companies Act, it is practicable for it to convene a meeting. The Court shall not intervene here.

[Application dismissed with costs.]

Cases referred to:

In re El Sombrero Ltd. [1958] LR Ch 900
Leong Ah Heng v. Hup Seng Ltd. [1963] 27 MLJ 164
In re Malhati Tea Syndicate Ltd. [1950] 55 Cal W 653
The Commissioner, Lucknow Division v. The Deputy Commissioner of Palabgarh [1937] 41 CWN 1072
Ex parte Pollak [1950] SALR [WLD] 701
Edinburgh Workmen's Houses Improvement Co. [1935] SG 56
Re Zimmerman [1966] 58 DLR 160
Re Canadian Javelin Ltd. [1976] 69 DLR 3d 439
Omega Estates v. Ganke [1964] 80 WN 1218

Legislation referred to:

Companies Act 1965, ss. 144(3), 145(1), 150
Canada Corporations Act RSC 1952, s. 104

Other source referred to:

Malaya Law Review, Vol. 24 at p. 250

For the plaintiffs - G. Sri Ram; M/s Sri Ram, Zulkifly & Kumar
For the defendants - T. Thomas; M/s Skrine & Co.
For the applicant/intervener - J. Gomez; M/s John Gomez & Associates

JUDGMENT

Zakaria Yatim J:

This is an application by Normalan Sdn. Bhd. for an order of the Court (1) to allow it to intervene in this action; (2) that a general meeting of the first plaintiff to be called, held and conducted in such manner as the Court thinks fit and (3) that all proceedings in this action to be stayed until after the completion of the general meeting; and other ancillary or consequential orders.

Before I deal with prayers (2) and (3) of the application, I propose to mention briefly the events that had taken place prior to the filing of this application.

On 8 October 1984 some members of the plaintiff company requisitioned an emergency general meeting (EGM) under s. 144 of the Companies Act, 1965. On 3 December 1984 the EGM was held. What happened at the EGM is the subject matter of the present suit. There were two factions at the EGM. One faction comprised the defendants who are nominees of the Malaysian Mining Corporation Bhd. (MMC) and the other faction comprised of Mr. K.C. Koh and his followers (the K.C. Koh's faction). The MMC's faction claimed that the EGM was lawfully terminated. The K.C. Koh's faction however maintained that the EGM was not lawfully terminated and the EGM continued thereafter and directors were elected from the floor. From 4 December 1984 the two factions claimed to have two boards of directors of the plaintiff company. The MMC's faction's contention was that the decision of the EGM on 3 December 1984 was not legal and decided that legal advice be sought on the validity of the requisition. To implement this decision, the MMC's faction caused the issue of notice on 7 December 1984 for the holding of the board of directors' meeting on 11 December 1984 to make the decision to secure the legal advice.

On 10 December 1984, the K.C. Koh's faction made an *ex parte* application and secured an injunction (encl. 6) restraining the 1st, 3rd and 4th defendants from carrying out their duties as directors. The *ex parte* order also required all the defendants to return all the properties of the company to K.C. Koh's faction. On 11 December 1984 this order was served on some of the directors and the board meeting was not held.

On 12 December 1984, the MMC's faction made an *ex parte* application and secured a variation and suspension of the injunction granted on 10 December 1984. (See encl. 11). The effect of this order was a temporary suspension of the injunction granted on 10 December 1984. The 1st, 2nd, 3rd and 4th defendants were restrained from holding any board of directors meeting of the company. They were, however, allowed to discharge their functions as directors. The day to day running of the Company was unaffected. The defendants were required to give an undertaking not to transfer the assets of the company.

An *inter parte* hearing of the defendant's application to set aside the injunction dated 10 December 1984 was fixed by the Court on 27 and 28 December 1984. On the second day of the hearing, Counsel for the plaintiff, Mr. H. Tennakoon fell ill and the case was postponed.

On 4 February 1985, the defendants made an *ex parte* application and obtained an injunction against Datuk K.C. Koh, who was named a third party. (See encl. 35). The effect of the order was to restrain him from convening a meeting of a board of directors of the plaintiff company.

I shall now deal with the merits of the intervener's application.

The application is made under s. 150 of the Companies Act, 1965. The section states:

> If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called held and conducted in such manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

In order to succeed in the application, the applicant must show that it is impracticable to call a meeting of the company in the manner prescribed by the articles of the Company or by the Companies Act. In its affidavit, (encl. 45) in support of the application, the applicant averred as follows:

> The intervener was the registered shareholder of the Company and owns 100,000 shares. The Intervener believed that the present Court action was the result of factional struggle between rival shareholders of the Company. It was believed that there would be protracted litigation between the rival factions and the principal victims would be the company and its shareholders. By reason of the injunction and cross injunction there was effectively no board of directors that could call a meeting of the company. It was, therefore, impracticable to call a meeting of the shareholders of the Company in accordance with the provisions of the Company's memorandum and Articles of Association.

Counsel for the applicant, Mr. John Gomez submitted that it was totally impracticable and almost impossible to call a meeting of the company under the present circumstances. He referred to Article 53 of the Company's Articles of Association and said that the Article could not be invoked. The Article states:

> The Directors may whenever they so decide by resolution convene an extraordinary general meeting of the Company. In addition, an extraordinary general meeting shall be convened on such requisition as is referred to in s. 144 of the Act.

Mr. Gomez further submitted that his client was entitled to call the meeting under s. 150. He quoted a commentary entitled "Impracticability and the Court's Power to Convene a Company Meeting" appearing in the *Malaya Law Review*, Vol. 24 at p. 250 where it is stated "The situation in which courts have ordered company meetings... in the context of the factional struggle in private companies." Mr. Gomez then cited the case of *In re El Sombrero Ltd.* [1958] LR Ch 900 on the meaning of the word 'impracticable'. In that case Wynn-Parry J in his judgment at p. 904, said:

> It is to be observed that the section opens with the words 'If for any reason,' and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are "... it is impracticable to call a meeting of a company ..." The question then arises, what is the scope of the word 'impracticable'? It is conceded that the word 'impracticable' is not synonymous with the word 'impossible' and it appears to me that the question necessarily raised by the introduction of that word 'impracticable' is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held. Upon the face of the section there is no express limitation which would operate to give those words 'is impracticable' any less meaning than that which I have stated, and I can find no good reason in the arguments which have

been addressed to me on behalf of the respondents for qualifying in any way the force of that word 'impracticable' or the interpretation which I have placed upon it, and therefore upon that point I am in favour of the applicant.

Mr. Gomez also referred to the case of *Leong Ah Heng v. Hup Seng Ltd.* [1963] 27 MLJ 164.

The intervener's application was supported by the plaintiff company. Mr. Sri Ram, in his submission in support of the application said, "The entire action will have to be stayed and the matter be referred to a meeting." Curiously enough, it was the K.C. Koh's faction which instituted the present action: On 10 December 1984, the plaintiff filed the present action against the defendants. On the same date the plaintiff made an *ex parte* application and obtained an injunction against the defendants. Now the plaintiff is asking the Court to order a meeting under s. 150 of the Companies Act and stay all proceedings including those instituted by it.

I shall now examine Mr. Sri Ram's arguments in support of the application. According to him, under s. 150, once the impracticability was satisfied, the Court had the power to order the meeting. He added that impracticability under the section was a question of fact depending upon the facts and circumstances of each case. On the facts of the present case, he said, the impracticability had been satisfied.

He then cited *In re Malhati Tea Syndicate Ltd.* [1950] 55 Cal W 653 and *The Commissioner, Lucknow Division v. The Deputy Commissioner of Palabgarh* [1937] 41 CWN. 1072 on the meaning of the word "practicable". In the former case the Court defined the word as 'impracticable' from a reasonable point of view. The Court must take a commonsense view of the matter and must act as reasonable point of view. Mr. Sri Ram then cited the case of *Ex parte Pollak* [1950] SALR [WLD] 701. But this case does not apply to the present situation. In that case the Court allowed a meeting to be convened because the applicant had attempted to convene a meeting but unable to do so for lack of quorum. The Court held that the applicant alone could make up a quorum. Similarly, in the case of *Edinburgh Workmen's Houses Improvement Co.* [1935] SG 56 @ 59 the Court allowed a meeting to be held because it was impracticable to get a meeting with the appropriate quorum. Mr. Sri Ram next cited *Re Zimmerman* [1966] 58 DLR 160. In that case, as a result of a proxy fight for control of a corporation, injunctions were issued by a Judge in Quebec suspending for an indefinite period of time the holding at Montreal of the regular annual general meeting of a company. The Court ruled that the Judge in Prince Edward Island would be exceeding the bounds of propriety in ordering a meeting be held in Toronto under s. 104 of the Canada Corporations Act, RSC 1952. (s. 104 is similar to our s. 150). I do not find *Zimmerman's* case helpful to the present application. Mr. Sri Ram next cited the case of *Re Canadian Javelin Ltd.* [1976] 69 DLR 3d. 439. In that case there were two warring factions in a corporation, both claiming to have control of the corporation and both appointing boards of directors. As a result, the company was placed in a precarious financial and business position. The company was in default of holding its annual meeting of shareholders be called as soon as possible to elect new directors. It was held that it was impracticable in such circumstances to call such a meeting or to conduct it otherwise than by order of the Court and under the supervision of the Court. The *Re Canadian's* case appears to support the intervener's application because in that case the matter had to be referred to the Court and the Court had no other alternative but to order a meeting under its supervision.

But in the instant case, the applicant or the plaintiff company can still call a general meeting without seeking the order of the Court. Counsel for the defendants, Mr. T. Thomas submitted that it was not impracticable for the interveners to call a general meeting. According to him

there were still two avenues open to the applicant to call a general meeting. The first avenue was under s. 144(3) of the Companies Act. The second avenue was under s. 145(1). I agree with the submission of Mr. Thomas.

Section 144(3) clearly states:

> If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting the requisitionists or any of them representing more than one-half of the total voting rights or all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting, but any meeting so convened shall not be held after the expiration of three months from that date.

Since the directors could not call a meeting because of the injunction, the applicant may requisition and convene a meeting on the expiry of twenty-one days after the deposit of the requisition. Alternatively, if the applicant and its supporters in the K.C. Koh's faction have more than 50% of the total voting rights as alleged, they can also convene a meeting. In the letter exhibited in encl. 50, the K.C. Koh's faction, including the intervener, claimed that they own 50.3% of the issued and paid-up capital of the Company. If this is true then they can proceed to convene the meeting and there is no necessity to ask the leave of the Court under s. 150.

The other provision of the Act referred to by Mr. Thomas is s. 145(1) which states:

> (1) Two or more members holding not less than one-tenth of the issued share capital or, if the company has not a share capital, not less than five per centum in number of the members of the company or such lesser number as is provided by the articles may call a meeting of the company.

The applicant and its supporters can easily call a meeting under this section because they claimed that they owned 50.3% of the issued and paid-up capital of the Company.

Since there are two avenues open to the applicant to call a general meeting, it is practicable for it to convene a meeting. The Court will only intervene under s. 150 if it is not practicable for the applicant to call a meeting either under its Articles of Association and under the relevant provisions of the Companies Act. In *Leong Ah Heng v. Hup Seng Co., supra.*, Suffian J as he then was rightly said in his judgment at p. 165:

> In my judgment, in a matter such as the one before me it is not enough for the applicant to satisfy me that it is impracticable to call or conduct a meeting: he must further satisfy me that it is impracticable to call a meeting of the Company in any manner in which meetings of that Company may be called, or to conduct the meeting of the Company **in manner prescribed by the Articles or the Ordinance** ... But here ... the applicant .. has not satisfied me that the Articles or the Ordinance make it impracticable to call or conduct a meeting of the Company.

Similarly in *Omega Estates v. Ganke* [1964] 80 WN 1218 @ pp 1223, 1224, Else-Mitchell J said:

> Section 142 has perhaps more important limitations than s. 366 because it can be invoked only where 'it is impracticable to call a meeting in any manner in which meetings may be called or to conduct a meeting in the manner prescribed by the articles or this Act.' In view of the power which members have to convene a meeting by requisition either under Article 41 of Table A or s. 138 of the Companies Act, 1961, I cannot hold in the circumstances of this case that there is any impracticability in calling a meeting of members in any manner in

which meetings may be called: it is not enough that there may be no directors who can convene a meeting for the section applies only where in effect there is no practicable means of calling a meeting.

I entirely agree with the two passages quoted above.

For the reasons stated above, I dismiss the application with costs.

Also found at [1985] 1 CLJ 442